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*Kevin L. Smith*

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tax court

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**  
Attorney General of Indiana

**IN THE  
COURT OF APPEALS OF INDIANA**

[illegible]

No. 49A02-0707-CR-590

APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Jose Salinas, Judge  
Cause No. 49G17-0705-CM-82207

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Antoine Beech (“Beech”) was convicted in Marion Superior Court of one count of Class A misdemeanor invasion of privacy. Beech appeals and presents three issues for our review:

- I. whether the trial court abused its discretion in admitting the testimony of the State’s witness;
- II. whether the trial court erred in taking judicial notice of an order issued in another case in the same court and involving the same defendant; and
- III. whether the evidence is sufficient to support Beech’s conviction.

We reverse.

### **Facts and Procedural History**

On May 9, 2007, Indianapolis Metropolitan Police Department (“IMPD”) Officer James Briggs (“Officer Briggs”) was dispatched to perform a “welfare check” on S.J. at her apartment in Indianapolis. When Officer Briggs arrived at S.J.’s apartment, another IMPD officer, Officer Wolf, was already there. Also in the apartment were S.J. and Beech, who was in handcuffs when Officer Briggs arrived. Once he found out who Beech was, Officer Briggs ran a computer check and discovered that Beech had an outstanding warrant for his arrest and that a no-contact order had been issued which prohibited Beech from speaking with S.J. or being at her apartment. Officer Briggs arrested Beech based upon the outstanding warrant and his apparent violation of the no-contact order.

On May 10, 2007, the State charged Beech with Class A misdemeanor invasion of privacy. A jury trial was held on June 12, 2007. At the trial, Beech objected to the testimony of Officer Briggs. Although not entirely clear, the gist of Beech’s objection

was that because Officer Briggs was not the first officer on the scene, there was no evidence as to why Beech had been handcuffed and detained and that, without such evidence, Officer Briggs's testimony was inadmissible as the fruit of an illegal investigatory stop. The trial court overruled Beech's objection and allowed Officer Briggs to testify as to what he saw once he arrived at S.J.'s apartment. The State did not call Officer Wolf to testify.

Beech also objected at trial to the admission of the no-contact order because it did not indicate when Beech had signed the order.<sup>1</sup> When confronted with Beech's objection, the trial court took judicial notice of its chronological case summary ("CCS") in the cause in which the court had issued the no-contact order. The CCS in the other case indicated that Beech had reviewed and signed the no-contact order before it was filed on January 26, 2007. At the conclusion of the trial, the court found Beech guilty as charged. Beech now appeals.

### **I. Admission of Evidence**

The first issue presented by Beech is whether the trial court erred in admitting the testimony of Officer Briggs. Although Beech challenged the admission of this testimony by way of a "motion to suppress," he now appeals following a completed bench trial. Thus, the issue is more appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial. Widduck v. State, 861 N.E.2d 1267, 1269 (Ind. Ct. App. 2007). Our standard of review of rulings on the admissibility of evidence

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<sup>1</sup> Although the order was marked as having been filed on January 26, 2007, and the trial court judge's signature was dated January 26, 2007, Beech's signature was not dated.

is essentially the same whether the challenge is made by a pre-trial motion to suppress or by trial objection: we do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling and the uncontested evidence favorable to the defendant. Id.

Although not cited by either party on appeal, the holding in Rich v. State, 864 N.E.2d 1130 (Ind. Ct. App. 2007), compels us to conclude that the trial court erred in admitting Officer Briggs's testimony.<sup>2</sup> In Rich, a sheriff's deputy, Deputy Gray, responded to a call where an off-duty police detective, Detective Daniel, had stopped defendant Rich near the side of the road. Deputy Gray noticed that Rich appeared to be intoxicated. Rich admitted that he had drunk alcohol, but claimed that he had not had a drink in over an hour. Deputy Gray arrested Rich for public intoxication.

At trial, Rich moved to suppress Deputy Gray's testimony, arguing that his initial detention by Detective Daniel was impermissible and, therefore, all subsequently obtained evidence, including Deputy Gray's testimony regarding Rich's intoxication, should be suppressed. The trial court denied the motion as untimely and found Rich guilty as charged.

On appeal, Rich claimed that the trial court erred in denying his motion to suppress. After concluding that Rich's motion to suppress was not untimely, the Rich court addressed the validity of Detective Daniel's initial stop of Rich. Id. at 1132. The court noted that a police officer may detain a person if the officer has a reasonable and articulable suspicion that the person has been, is, or is about to be engaged in criminal

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<sup>2</sup> Beech's trial counsel cited Rich when moving to suppress Officer Briggs's testimony at trial.

activity. Id. (citing Wells v. State, 772 N.E.2d 487, 489 (Ind. Ct. App. 2002)).<sup>3</sup> The court also noted that when a defendant challenges whether evidence was gathered properly under the Constitution, the State bears the burden of proving the evidence was admissible. Id. at 1132. The court then concluded:

Based on the evidence the State presented in response to Rich's motion to suppress, we have no choice but to suppress the remainder of Deputy Gray's testimony. Evidently, the State did not request the presence of Detective Daniel at Rich's trial, and Detective Daniel was the only person who could explain the facts and circumstances that led to his stop of Rich. Without his testimony, we have no basis for holding an ordinarily prudent person would have believed criminal activity was afoot. Therefore, we must reverse.

Id. at 1133 (footnote omitted).

Here, we are faced with an indistinguishable situation. Officer Wolf was the first to arrive at S.J.'s apartment and was the officer who placed Beech in handcuffs. Without Officer Wolf's testimony, the State had no evidence to establish that Beech's initial detention was justifiable. Indeed, Officer Wolf, like Detective Daniel in Rich, was the only person who could explain the facts and circumstances that led to the initial detention of the defendant. As in Rich, the State chose not to call as a witness the officer who arrived first and who initially detained the defendant. When Beech challenged his initial detention and the evidence subsequently obtained as a result thereof, it was the State's burden to establish the justification for Beech's detention. We have little doubt that the State could have met this burden simply by calling Officer Wolf to testify, but it did not do so. Because of this failure, the State could not establish the propriety of Beech's

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<sup>3</sup> Wells, in turn, cited Terry v. Ohio, 392 U.S. 1 (1968).

initial detention by Officer Wolf. Any evidence obtained as a result of this detention should have been excluded at trial.

The State argues that it presented no evidence which could be considered the “fruit” of Beech’s detention and, therefore, that even if Beech’s detention cannot be justified, there was no tainted evidence to suppress or exclude. This is incorrect. As in Rich, the testimony of the officer who arrived second was the fruit of the initial stop. Without any evidence as to the propriety of the initial stop, the trial court could not properly admit Officer Briggs’s testimony. Moreover, the State cannot rely upon the fact that Beech was in violation of the no-contact order by being in S.J.’s apartment when Officer Briggs arrived. There is no evidence that Officer Briggs was aware of the no-contact order when he initially arrived on the scene, and there was no evidence presented as to precisely how Beech came to be in S.J.’s apartment.

Because the State could not present any evidence justifying Officer Wolf’s detention of Beech, the evidence subsequently obtained, including Officer Briggs’s testimony, should not have been admitted at trial. See Rich, 864 N.E.2d at 1133.

## **II. Judicial Notice**

Beech also claims that the trial court acted improperly when it took judicial notice of facts regarding the no-contact order, which was issued in a different cause before the same trial court judge. As a general rule, a trial court may not take judicial notice of its own records in another case previously before the court, even on a related subject and with related parties. Bonds v. State, 729 N.E.2d 1002, 1006 (Ind. 2000). The State does not deny that the trial court erred in taking judicial notice of its records in the previous

cause. Instead, the State claims that Beech waived this issue by failing to object at trial and that any error is harmless.

Although Beech did object to the admission of the no-contact order on grounds that there was no indication as to when he signed the order, he did not specifically object when the trial court took judicial notice of its records in the previous cause. Therefore, this issue has not been properly preserved for our review. See Wright v. State, 766 N.E.2d 1223, 1231 (Ind. Ct. App. 2002) (absent a contemporaneous objection sufficient to alert the trial court of the legal issues involved, argument regarding admission of evidence was waived).

### **III. Sufficiency of Evidence**

Beech argues that, excluding the improperly-admitted evidence, there is insufficient evidence to support his conviction for invasion of privacy. We agree. Without the testimony of Officer Briggs, there is simply no evidence to establish that Beech was in violation of the no-contact order. We therefore must reverse Beech's conviction.<sup>4</sup>

Reversed.

FRIEDLANDER, J., and ROBB, J., concur.

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<sup>4</sup> We feel compelled to note that the reversal of Beech's conviction could have been averted had the State simply called Officer Wolf to testify regarding the circumstances leading to his detention of Beech. But without this testimony, we cannot assume that Beech's detention was justified, however likely that may be. This was the State's burden, which it failed to meet.